United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7133

In The

United States Court of Appeals

For the Second Circuit

B
P/S

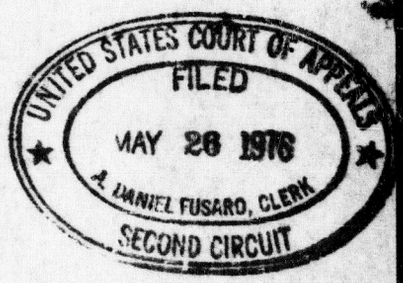
BARBARA NOBLE,

Plaintiff-Appellant,

vs.

THE UNIVERSITY OF ROCHESTER and STRONG MEMORIAL HOSPITAL,

Defendants-Appellees.



ON APPEAL FROM THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 75-516

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(1978)

Spaulding Law Printing
Syracuse, New York

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STATEMENT OF ISSUE PRESENTED

DID THE COURT BELOW PROPERLY DISMISS THE COMPLAINT OF PLAINTIFF-APPELLANT BARBARA NOBLE?

STATEMENT OF THE CASE

Plaintiff-appellant Barbara Noble ("Noble") commenced this action on November 21, 1975 against defendants-appellees, the University of Rochester and Strong Memorial Hospital (the "University" and "Strong" respectively, collectively referred to as "defendants"), making broad allegations of sex discrimination[1] and denial of equal pay[2] (A. 3-23).[3] By motion dated December 12, 1975, defendants moved for dismissal of Count I of the complaint; dismissal of Count II insofar as it sought injunctive relief; sought to have all allegations of denial of equal pay made on behalf of persons other than the plaintiff stricken; and further sought to have all allegations of discrimination occurring prior to November 7, 1974 stricken (A. 30-31).

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1. Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., hereinafter cited as Title VII.

2. Fair Labor Standards Act as amended by the Equal Pay Act, 29 U.S.C. § 201 et seq., hereinafter cited as the Equal Pay Act.

3. References to the Joint Appendix are cited: (A.).

Noble cross-moved to compel discovery (A. 41). The District Court for the Western District of New York, the Honorable Harold P. Burke, Judge, by Decision and Order dated March 1, 1976, dismissed the entire complaint (A. 74-75). The Court did not consider or render a decision on matters raised by defendants' motion for relief, other than dismissal, or those raised by Noble's cross-motion to compel discovery. Dismissal of the complaint rendered these issues moot. It is from the dismissal of the complaint that this appeal is brought.

Noble, a registered nurse, was first employed by Strong in 1969 and assigned to the operating room (A. 7). Noble, thereafter assigned to the "pump team," was trained as a perfusionist to operate Strong's heart-lung machine (A. 8). In June, 1973, while employed by defendants, Noble became certified as a cardiac perfusionist (A. 10). Prior to her recent educational leave of absence (App. Br. 2),[4] Noble was employed at Strong in the job classification of "Nurse Perfusionist" (A. 10).

In December, 1973, defendants created a new supervisory position, that of "Chief Perfusionist" (A. 8-9). Thereafter, in January of 1974, Aaron Hill, a male perfusionist, was promoted to this new position (A. 32).

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4. References to appellant's brief are cited: (App. Br.).

Noble filed a complaint with the New York State Division of Human Rights (the "State Division"), on March 3, 1975. On that same date, she also forwarded a similar complaint to the Equal Employment Opportunity Commission ("EEOC") (A. 45, 55), and was subsequently issued a "Notice of Right to Sue Within 90 Days" by the District Director on September 30, 1975 (A. 18).[5]

ARGUMENT

The Court below properly dismissed Noble's complaint. The filing of a charge with the EEOC, a jurisdictional prerequisite to Count I of the complaint (A. 6-12), which alleged a violation of Title VII, was patently untimely. Further, Count II of the complaint (A. 12-13), alleging a violation of the Equal Pay Act, failed to state a claim and was properly dismissed.

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5. The issuance of the "Notice" by EEOC was premature. Although Noble filed her complaint with the New York State Division of Human Rights on or about March 3, 1975, the filing of her charge with EEOC was not effective until 60 days thereafter (May 2, 1975), Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). Title VII, Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) requires that 180 days elapse prior to issuance of such notice. See page 6, infra.

POINT I

APPELLANT'S COMPLAINT UNDER TITLE VII IS TIME-BARRED

Noble failed to file her initial charge with the EEOC within the statutorily prescribed period in accordance with Section 706(e) of Title VII. The attempt to characterize a single act, the denial of promotion, as a "continuous" violation of Title VII, and thereby circumvent the statute's time limitations, was properly rejected by the Court below.

A. A timely filing of a charge with the EEOC is a jurisdictional prerequisite to the maintenance of an action in federal court.

It is well settled that the timely filing of a charge before the EEOC is a jurisdictional prerequisite to institution of an action predicated upon a violation of Title VII, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972); Stebbins v. Nationwide Mutual Insurance Co., 382 F.2d 267 (4th Cir. 1967), cert. denied, 390 U.S. 910 (1968); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971); See, also, DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975).

B. Appellant failed to file her complaint within the statutorily prescribed period.

A party claiming to be aggrieved, and seeking relief under the provisions of Title VII, is required to file a timely complaint with the EEOC within 180 days of the alleged act of discrimination, Section 706(e). However, where a State, such as New York,[6] has established and maintains an administrative agency to deal with discriminatory conduct covered by Title VII, "no charge may be filed...by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law...," Section 706(c). The charge brought before the state agency must also be timely brought under local law, Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972).[7] Where such an agency has been established, the period within which to file a charge with the EEOC is extended to 300 days, Section 706(e).

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6. The New York State Division of Human Rights is an agency recognized by the EEOC as empowered to deal with allegations of sex discrimination such as those brought by Noble.

7. The timeliness of Noble's charge before the State Division is currently in dispute in a matter pending before the Supreme Court of the State of New York, Appellate Division, Fourth Department.

Aaron Hill was promoted to the position of Chief Perfusionist in January, 1974 (A. 32). Noble does not dispute this, but contends instead that Hill was unqualified initially, and remained unqualified at least until July, 1975 (A. 9; App. Br. 11). However, it is the act of promotion which is the relevant act of discrimination, if any, for which Noble might have been entitled to relief; that the preferred individual remained unqualified in no way changes the nature of the injury, nor can it be said to extend the time limitations of the statute.

The timeliness of Noble's charge is measured against the effective date of her filing with the EEOC. In light of the specific language of Section 706(c) of Title VII that "no charge may be filed" with the EEOC until 60 days after a charge is filed with the state agency, the Court in Moore v. Sunbeam Corp., supra, 459 F.2d at 826, held that the EEOC charge which had been filed simultaneously with the state charge was not effective until 60 days thereafter. See, also, Love v. Pullman Co., 404 U.S. 522 (1972); contra, Richard v. McDonnell Douglas Corp., 469 F.2d 1249 (8th Cir. 1972). Therefore, in this instance, the effective date of the filing of Noble's EEOC charge was not March 3, 1975, the date on which Noble filed her charge with the State Division; but, rather, the effective date was 60

days after filing with the State Division -- May 2, 1975, Moore v. Sunbeam Corp., supra.

Noble's charge was timely only if the alleged discrimination occurred within the 300-day period prior to May 2, 1975. Therefore, the critical date in determining the timeliness of the charge is July 7, 1974, 300 days before May 2, 1975. Since the promotion of Aaron Hill undisputedly occurred in January, 1974 (A. 32), far earlier than the 300 day limitation, Noble's charge is patently untimely.

Further, even assuming that the charge is deemed filed with the EEOC as of its filing with the State Division on March 3, 1975, Noble's charge is still untimely. This 300-day period would extend between May 7, 1974 and March 3, 1975. Obviously, the promotion of Hill, which occurred in January, 1974, is not within this period either. The complaint was therefore properly dismissed, McDonnell Douglas Corp. v. Green, supra; Moore v. Sunbeam Corp., supra; Stebbins v. Nationwide Mutual Ins. Co., supra; Richardson v. Miller, supra.

C. A single act, the denial of promotion, does not constitute a "continuing" violation.

The principle of "continuing" violation may be appropriate in certain circumstances. However, this is not

such a case. As the Court in Stroud v. Delta Airlines, Inc, 392 F. Supp. 1184, 1189 (N.D. Ga. 1975), stated:

> "This well recognized principle does not apply in every case, however; an overbroad application of the continuing discrimination principle would effectively eliminate any period of limitations for Title VII actions in contravention of congressional intent and in possible derogation of the conciliatory purposes fostered by requiring EEOC negotiation of employment discrimination complaints."

Noble repeatedly asserts that her complaint alleges acts of discrimination of a "continuing nature," (App. Br. 4, 7, 8, 9). However, other than mere repetition of such conclusory allegations, the sole instance of discriminatory action alleged is the denial of promotion to the position of Chief Perfusionist in January, 1974. Obviously, the conclusory allegations of "continuing" discrimination are attempts to circumvent the statutory limitations of time.

It is well accepted that a single act such as the denial of promotion, demotion, or layoff, without more, is not a "continuous" violation. As the then Judge, now Justice Stevens, in Moore v. Sunbeam Corp., supra, 459 F.2d at 828, stated:

> "The failure to promote may be a 'continuing' offense if it is followed by repeated promotions of others in preference to the complainant..." (Emphasis supplied).

Similarly, in Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1183-1184 (N.D. Ga. 1975), the Court held that, standing alone, an allegedly discriminatory demotion did not constitute a "continuing" violation and thereby extend the statute of limitations.

> "[P]laintiff complains of her demotion from her previous job, alleging that the demotion resulted from her female sex, whereas other male employees were not similarly demoted. A demotion, standing alone, does not give rise to a claim of continuing discrimination. In order for the claim to be continuing, the discriminatory demotion must be followed by discriminatory hiring or promotion practices; but defendant's affidavits indicate otherwise. The act complained of in this suit, even if part and parcel of a pattern and practice of discriminatory demotions, was complete with respect to plaintiff as of the effective date of the demotion, September 19, 1970. Since [the] EEOC Complaint...was not filed within 90 days of this date, the instant action is barred."

See, also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Dupree v. Hutchins Bros., 521 F.2d 236 (5th Cir. 1975); Mason v. Owens-Illinois, Inc., 11 FEP 441 (S.D. Ohio 1973), rev'd on other grounds, 517 F.2d 520 (6th Cir. 1975).

Noble alleges that the one-time denial of promotion, occurring in January 1974, is a "continuing" act of discrimination since her pay is lower than it would have been if she had been promoted. The wrong of which complaint is made is a one-time event, even though Noble may claim that continuing consequences, i.e. lower pay, have resulted.

(See, e.g., Moore v. Sunbeam Corp., supra, 459 F.2d at 828.) The court must distinguish between the causative event and resultant damages. The limitations of time runs from the time of the causative event, when liability, if any, is complete. Thus, in a negligence action, the statute of limitations commences to run from the date of personal injury, a single event, even though the physical and financial consequences may continue through trial or permanently. In a libel action, the statute of limitations commences to run from the date of publication, a single event, even though the damage to personal reputation may continue even through trial or permanently. It is the injury-producing event, an event specific in time, which initiates the running of the statute of limitations; that consequential injuries and damages subsequently flow from the injury-producing event does not serve to extend the statute of limitations. If that were not true, there could never be an effective statute of limitations.

Thus, in the case at hand, the injury-producing event, if any, occurred when Aaron Hill was promoted to Chief Perfusionist in January, 1974, allegedly in preference to Barbara Noble by reason of sex discrimination. That one-time occurrence, time-defined with specificity, is the point from which any time limitation would run. The fact that

Noble alleges continuing consequences in the form of a continuing loss of pay, measured by the difference between her pay and the pay of her supervisor, the Chief Perfusionist, does not serve to extend the 300 day statute of limitations.

When the discriminatory event occurred in January, 1974, liability, if any, was complete, the claim mature, and Noble had 300 days from that time to initiate her charges of sex discrimination.

D. Mere conclusory allegations are insufficient to establish a "continuous" violation.

Clearly, standing alone, Noble's charge of discrimination, whether construed to have been filed on May 2, 1975 or March 3, 1975, was untimely (supra, p. 7). However, Noble seeks to revive her stale claim through the use of conclusory allegations of a pattern and practice of discrimination and a frivolous and patently insufficient claim under the Equal Pay Act.

In Moore v. Sunbeam Corp., supra, the Court had occasion to consider the sufficiency of a complaint alleging specific acts occurring outside the time limits of Section 706(e), coupled with a conclusory charge that the discrimination was "continuous." In this regard, the Court stated that conclusory allegations that the discrimination

was continuous, "merely describe the continuing consequences of the earlier decision not to promote Moore." (See pages 9-10, supra). In the absence of allegations of specific acts within the relevant period, and lack of any evidence in the record of subsequent discrimination, the Court affirmed the lower Court's dismissal of the complaint as untimely, Moore v. Sunbeam Corp., supra, 459 F.2d at 828.

Likewise, in Loo v. Gerarge, 374 F. Supp. 1338 (D. Haw. 1974), the Court was also faced with determining the sufficiency of conclusory allegations such as those advanced by Noble in this case. In Loo, the plaintiff, in a charge filed first with the State agency and then with the EEOC, alleged specific acts occurring outside the appropriate 300 day period, and further alleged generally that the defendant's practices had "continuing effects." The plaintiff contended that the charge was therefore not untimely even though the specific instance alleged occurred outside the 300 day limit of Section 706(e). The Court, in rejecting this contention and holding the charge to be untimely, stated at p. 1340:

> "Although Plaintiff's complaint alleges in the first three causes of action a series of related acts, such as continual disparaging remarks, not one series is supported by a specific unlawful act alleged to have occurred (within the 300 day period). Under these circumstances, and given the generality of the complaint, the alleged discrimination cannot be said to have continued..."

The deficiency of conclusory allegations has been recognized by this Court in the past. In Avins v. Mangum, 450 F.2d 932 (2nd Cir. 1971), the Court affirmed dismissal of the complaint which contained nothing more than conclusory allegations of political discrimination. The deficiency of mere conclusory allegations was reaffirmed by the Court in its subsequent decision in Albany Welfare Rights Org. Day Care Ctr., Inc. v. Schreck, 463 F.2d 620 (2nd Cir. 1972).

Contrary to Noble's assertions, there is no support for the proposition that conclusory allegations of continuing discrimination are sufficient. Cox v. U.S. Gypsum Co., supra, did not hold, as Noble contends (App. Br. 10), that the mere insertion of the word "continuing" is sufficient to circumvent time limitations of Title VII. In Cox, the Court found that the record before it evidenced discriminatory recalls subsequent to the date of the alleged discriminatory layoff. When considered in conjunction with the "laymen's" allegation of "continuing" discrimination, the Court found this sufficient such that the allegations could be construed to include subsequent discriminatory recalls, Cox v. U.S. Gypsum Co., supra, 409 F.2d at 290. In this instance, the complaint, drafted by Noble's attorney,

alleges no subsequent discriminatory acts. There has been no subsequent denial of promotion. In fact, Aaron Hill continues to hold the position of Chief Perfusionist (A. 10). The conclusory allegations of continuous discrimination, without more, are insufficient, Moore v. Sunbeam Corp., supra; Loo v. Gerarge, supra; Cox v. U.S. Gypsum Co., supra.

Noble also attempts by the use of a frivolous claim of a denial of equal pay to resurrect a time-barred claim. As is clearly set forth at page 20-22, infra, Noble has no equal pay claim. To permit this patently insufficient claim to revive a claim for a denial of promotion would destroy any limitations period under Title VII. If such a ploy is sufficient, all that a plaintiff need do to revive a time-barred claim would be to assert any claim, no matter how unmeritorious, so long as, on its face, it was not time-barred. Clearly such a result would rewrite the statute.

Reliance by Noble upon the remainder of authority cited for the proposition that a denial of promotion is a "continuous" violation and that her charge was therefore timely, is likewise misplaced. For example, in Pacific Maritime Assoc. v. Quinn, 491 F.2d 1294 (9th Cir. 1974), the Court did not hold that a mere allegation that the discrimination continues is sufficient (App. Br. 10). The

Court held only that the question of limitations of time was premature at the EEOC investigatory stage. The Court further indicated that, if evidence of subsequent denials of promotion were uncovered, then the violation of Title VII would be considered to be continuous, supra, 491 F.2d at 1297. Likewise in Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972), the evidence before the Court indicated that following the original denial of written requests for transfer, subsequent oral requests were likewise denied. Obviously, as in Cox, supra, the determining factor was the presence, on the record, of evidence of subsequent acts of discrimination. In this instance, the record is barren of subsequent discriminatory conduct. The only promotion in question was a one-time occurrence which occurred in January, 1974 (A. 32). See, also, Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973), where, in the context of a class action,[8] the Court,

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8. Contrary to Noble's attempt to characterize this as a "class action" (A. 2, 8), and thus bootstrap an obviously stale claim beyond the time limits of Title VII, this is not a class action. "Not every civil action brought pursuant to Title VII automatically qualifies as a class action under the stringent requirements of Rule 23(a)," Kinsey v. Legg, Mason & Co., Inc., 60 F.R.D. 91, 98 (D.D.C. 1973). It is clear that Noble, to maintain a class action, must comply with the requirements of FRCP 23(a). See, e.g., Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974). See, also Campbell v. A.C. Petersen Farms, Inc., Civ. No. H-74-306 (D.C. Conn. December 23, 1975) (Slip opinion). In this action Noble has not sought certification to proceed with a class action and has admitted, contrary to her characterization of the complaint, that she seeks only redress of her own grievance (A. 46).

relying upon the reasoning in Cox, supra, sustained the timeliness of the laymen's claims in light of a comprehensive collective bargaining agreement providing for the manner in which layoffs, transfers and recalls would occur.

The decision in Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971), is inapposite. The Court in Bartmess reconciled treatment accorded a retirement plan under the National Labor Relations Act (29 U.S.C. §§ 151 et seq.) with its treatment under Title VII. As a present "condition of employment," the Court deemed a complaint timely even if filed prior to the date of retirement, supra, 444 F.2d at 1189.

Finally, Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) is distinguishable. In Rich, the Court, reversing the decision of the District Court, held the plaintiffs to be adequate class representatives. The several plaintiffs, on behalf of the class (supra, note 8), alleged discrimination on a plant-wide basis. Such is not the case in this instance. Here plaintiff seeks only the redress of her own personal grievance. In fact, Noble's attorney, in an affidavit to the Court below, stated:

> "Plaintiff, however, seeks only in this complaint relief for herself from the employment discrimination of the defendants...she does not seek to represent other employees in this lawsuit on their claims of discrimination," (A. 46).

The conclusion that the complaint was properly dismissed is inescapable. Noble has failed to allege any instance of discrimination other than the denial of promotion to the position of Chief Perfusionist, which occurred more than 300 days prior to the filing of any charge with the EEOC and even 300 days prior to her charge with the State Division. The conclusory allegations of continuing discrimination, without more, are insufficient to withstand a motion to dismiss, Moore v. Sunbeam, supra; Loo v. Gerarge, supra. In light of the insuperable bar to relief alleged by Noble, Lewis v. Chrysler Motors Corp., 456 F.2d 605 (8th Cir. 1972), the Court below properly dismissed Count I of the complaint.

E. Appellant seeks to eliminate the Congressionally prescribed time limitation from the statute.

To accept Noble's proposition that her charge was timely filed would effectively eliminate the Congressionally prescribed limitations of time. By sustaining a complaint, which alleges a patently stale claim in conjunction with a mere conclusory allegation of a "pattern and practice of discrimination," in effect permits any claim to be advanced without regard to age. If Noble's charge is sustained as timely, the Court then must also be willing to sustain a

charge by another plaintiff who might allege in conclusory form that a defendant maintains a "pattern and practice" of discrimination and that, in conjunction with this, he or she was denied promotion because of race, sex, etc., five years ago, or even ten years ago. To accept this is to rewrite the otherwise explicit statutory language of Title VII.

It must be noted that timeliness is not a "mere technicality." It is integral to the right itself. It is axiomatic that where a right is granted by statute and in conjunction with that right, limitations of time are imposed thereon, failure to abide by these limits does not result in a loss of the remedy but in an extinguishment of the right itself.

Further, the limitation of time in this instance is specifically designed to accord to a defendant certain rights. As the Court in Culpepper v. Reynolds Metals Co., 421 F.2d 888, 892, (5th Cir. 1970), stated:

> "'Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded...' (citing, Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).)
>
> * * *
>
> Congress in placing the various time limitations in Title VII was attempting to eliminate the problem of 'second thought complaints,' stale complaints and the hampering

> effect that they can have on our labor market. However, the time limitation is meant to penalize only those who sleep on their rights and remedies..."

Noble, having slept on her rights, was properly precluded by the Court below from resurrecting a stale claim.

It is well recognized that a time requirement may in some respects be arbitrary. However, to state that it is arbitrary begs the question. The underlying policy demands that a claim, even a meritorious claim, be promptly brought. A defendant has a right to this statutory guarantee and insistence upon it should cause no adverse inference: only a presumption of guilt would justify such an inference.

It is clearly recognized that it was the specific intent of Congress to place strict time limits upon rights granted under Title VII, Moore v. Sunbeam Corp., supra. To now disregard these time limits is to usurp the legislative function. Congress has lengthened the time in question and has amended the statute in other respects. If the time limits are to be extended or eliminated, then it is for Congress and not the Courts to decide. (See, e.g. Toussie v. United States, 397 U.S. 112 (1970)). The construction urged by Noble is not liberality but license!

POINT II

APPELLANT FAILED TO STATE A CLAIM UNDER THE EQUAL PAY ACT.

Count II of the complaint in this action alleges, in general terms only, that defendants, in violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1), have denied Noble equal pay for work, the performance of which requires equal skill, effort and responsibility (A. 12). Count II of the complaint fails to state a claim under the Equal Pay Act, and was properly dismissed by the Court below.[9]

Section 206(d)(1) of the Equal Pay Act provides in pertinent part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..." (Emphasis supplied.)

In addition to jurisdictional requirements, not presently at issue, the Equal Pay Act requires that the work involved

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9. The results of a decision may be sustained on grounds other than those relied upon by the Court below, J.E. Riley Inv. Co. v. Commissioner, 311 U.S. 55 (1940); Jaffke v. Dunham, 352 U.S. 280 (1957); Lum Wan v. Esperdy, 321 F.2d 123 (2nd Cir. 1963).

meet three criteria: first, the work must require equal skill; secondly, equal effort; and, thirdly, equal responsibility.

Alleging one or even two elements is insufficient to state a claim under Section 206(d)(1). The Act itself requires that all three be alleged. Scrutiny of the Noble complaint establishes beyond doubt that it fails to meet this test.

Noble does not seek pay equal to that of other perfusionists; she seeks pay equal to that of her Supervisor, the Chief Perfusionist -- a higher job classification. The record is insufficient to establish the sufficiency or insufficiency of Noble's allegations of equal skill[10] or effort. However, the conclusory allegation that Noble occupies a position of responsibility equal to that of Hill (A. 12) is belied by the underlying factual allegations contained within the complaint itself. Noble admits that she works under the supervision of Hill (A. 10). The supervisory responsibilities of Hill involve the supervision of the plaintiff and the remainder of the "pump team."

Further, the position taken by Noble with regard to the denial of promotion is inconsistent with the argument

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10. In the complaint itself however, Noble admits that the training of Aaron Hill extends beyond that of a mere perfusionist and includes training in electronics and chemistry (A. 9).

of a right to equal pay. On the one hand, Noble alleges that she has been denied a promotion, by definition an upgrade, from the position which she now holds as Nurse Perfusionist, to that of Chief Perfusionist. Yet, on the other hand, Noble attempts to allege that she, as a Nurse Perfusionist, is entitled to a salary equal to that of the higher supervisory position which she seeks.

Noble's sole complaint is that she was denied the position of Chief Perfusionist. Noble alleges that, after hard work, dedication, and an undisputed satisfactory work record, she "should have the title, status, position, pay and benefits of the Chief Perfusionist," (A. 11). This is Noble's grievance. However, the fact that the promotion of Aaron Hill to a higher position, to which Noble lays claim, may have been discriminatory, is not sufficient to state a claim under the Equal Pay Act.

The position occupied by Hill entails greater responsibilities, <u>including supervision of plaintiff herself</u> (A. 10). The greater responsibilities of Hill as Chief Perfusionist, as opposed to Noble as Nurse Perfusionist (A. 10), preclude a suit under the Equal Pay Act.

Count II of the complaint, predicated upon the provisions of the Equal Pay Act, failed to state a claim and was therefore properly dismissed.

POINT III

APPELLANT ADDRESSES ISSUES NOT BEFORE THIS COURT.

Noble seeks to address issues which are not before this Court in this appeal. The issue of the relevant statute of limitations under the Equal Pay Act (App. Br. 13, 14); the "willfulness" of defendants' actions (App. Br. 14); or the merits of Noble's cross-motion to compel discovery (App. Br. 12, 15-16), are not before this Court.

The preliminary determination by the Court below, that the complaint should be dismissed, precluded consideration of these issues as moot. Not having been considered by the Court below, nor subject to a final decision, as required by 28 U.S.C. § 1291, these issues are not presently before the Court. Further, common sense dictates that, absent an opportunity for consideration below, issues within the unique province of the trial court are not ripe for appellate review.

CONCLUSION

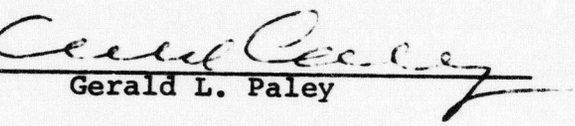
The Court below properly dismissed Noble's complaint. The charge filed with the EEOC was untimely and, therefore, absent compliance with this jurisdictional prerequisite, Noble was properly precluded from maintaining an

action under Title VII. Further, the allegations of violation of the Equal Pay Act, deficient on their face, failed to state a claim and were therefore properly dismissed. The Order of the Court below dismissing plaintiff's complaint should be affirmed.

Dated: May 24, 1976

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE

By 
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Affidavit of Service

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

May 24, 1976

Re: Noble v The University of Rochester et al

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Nixon, Hargrave, Devans and Doyle

Attorney(s) for
Defendants-Appellees
On May 24, 1976
(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

Ms. Emmelyn S. Logan-Baldwin, Esq.
510 Powers Building
Rochester, NY 14614

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Sworn to before me this 24th day of May, 1976

Lester A. Fanning

Notary Public
~~Commissioner of Deeds~~
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Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978